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**In the Supreme Court**

OF THE  
**United States**

OCTOBER TERM 1948

No. 659

KANAME FUJINO,

*Petitioner,*

vs.

TOM C. CLARK, Attorney General of the  
United States,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI  
to the United States Court of Appeals for the  
Ninth Circuit.

J. GARNER ANTHONY,

WILLIAM F. QUINN,

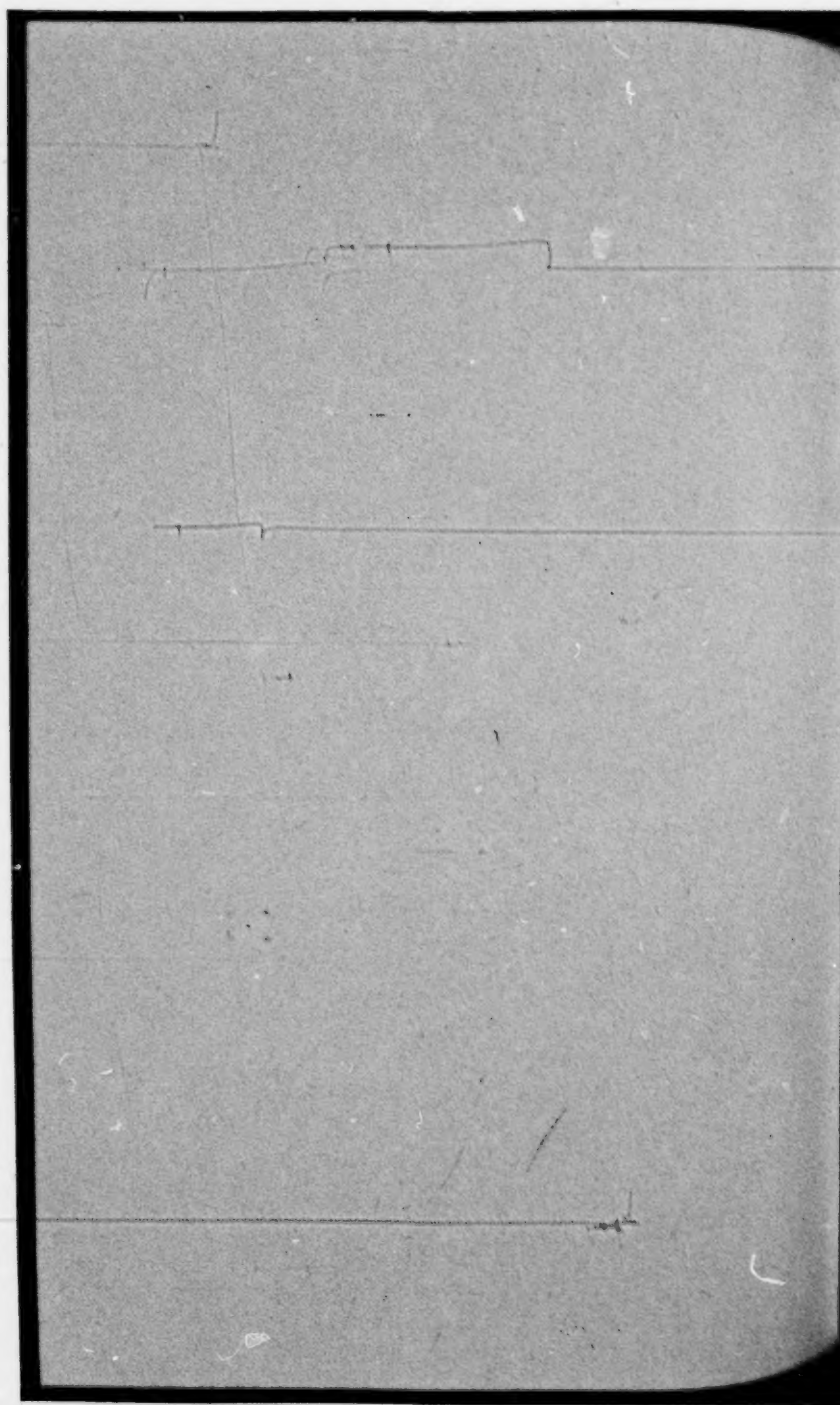
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## Subject Index

---

|  | Page |
|--|------|
| Summary statement of matter involved .....       | 2    |
| Opinions below .....                             | 6    |
| Jurisdiction .....                               | 6    |
| Questions presented .....                        | 7    |
| Statutes involved .....                          | 8    |
| Reasons relied on for allowance of the writ..... | 8    |

---

## Table of Authorities Cited

---

| Cases   | Pages |
|---|-------|
| Arnold v. Reed, 162 Mass. 438 (1894) .....                | 3     |
| Central Trust Co. v. Garvan, 245 U. S. 554 (1921).....    | 10    |
| Clark v. Uebersee Finanz-Korp., 332 U. S. 480 (1947)..... | 9     |
| Oyama v. California, 332 U. S. 633 (1947) .....           | 5     |

### Statutes

|  |                |
|--|----------------|
| Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 1, et seq. ....         | 2              |
| Section 2 .....  | 10             |
| Section 5(b) .....   | 5, 7, 8, 9, 10 |
| Section 7(c) .....   | 8, 9, 10       |
| Section 9(a) .....   | 3, 6, 7, 9, 10 |
| Public Law 773, 80th Cong., 2d Sess.; Title 28, U.S.C. Secs. 1254 and 2101 ..... | 6              |

### Regulations

|   |   |
|---|---|
| Executive Order No. 9095, 7 Fed. Reg. (1942) 971.....     | 2 |
| Executive Order No. 9788, 11 Fed. Reg. (1946) 11981 ..... | 2 |

# REPORT

1900

The following is a report of the work done during the year 1900.

The work was done in the following order:

1. The first part of the work was done in the month of January.

2. The second part of the work was done in the month of February.

3. The third part of the work was done in the month of March.

4. The fourth part of the work was done in the month of April.

5. The fifth part of the work was done in the month of May.

6. The sixth part of the work was done in the month of June.

7. The seventh part of the work was done in the month of July.

8. The eighth part of the work was done in the month of August.

9. The ninth part of the work was done in the month of September.

10. The tenth part of the work was done in the month of October.

11. The eleventh part of the work was done in the month of November.

12. The twelfth part of the work was done in the month of December.

13. The thirteenth part of the work was done in the month of January.

14. The fourteenth part of the work was done in the month of February.

15. The fifteenth part of the work was done in the month of March.

16. The sixteenth part of the work was done in the month of April.

17. The seventeenth part of the work was done in the month of May.

18. The eighteenth part of the work was done in the month of June.

19. The nineteenth part of the work was done in the month of July.

20. The twentieth part of the work was done in the month of August.

21. The twenty-first part of the work was done in the month of September.

22. The twenty-second part of the work was done in the month of October.

23. The twenty-third part of the work was done in the month of November.

24. The twenty-fourth part of the work was done in the month of December.

# In the Supreme Court

OF THE  
United States

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OCTOBER TERM 1948

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No.

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KANAME FUJINO,

*Petitioner,*

vs.

TOM C. CLARK, Attorney General of the  
United States,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**  
to the United States Court of Appeals for the  
Ninth Circuit.

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*To the Honorable Fred M. Vinson, Chief Justice of  
the United States and to the Honorable Associate  
Justices of the Supreme Court of the United  
States:*

Kaname Fujino prays that a writ of certiorari  
issue to review the decree (R. 542) of the United  
States Court of Appeals for the Ninth Circuit en-

tered January 31, 1949, affirming the judgment of the United States District Court for the Territory of Hawaii entered June 5, 1947 (R. 60).

#### **SUMMARY STATEMENT OF MATTER INVOLVED.**

This case involves the right of petitioner, a native born, loyal American citizen, to recover his property that was seized by the Alien Property Custodian<sup>1</sup> under the Trading With the Enemy Act.<sup>2</sup> Petitioner, a resident of Hawaii, acquired the real estate by deed of gift from his alien father, a resident of Japan, on March 21, 1941 (R. 30). The deed was duly executed, delivered and recorded and was in fulfillment of the wishes of the father expressed in 1939 and 1940 (R. 83, 418-421). The deed was executed by the grantor's attorneys in fact acting under a power of attorney likewise duly recorded (R. 479) authorizing them to convey the real estate. After the deed had been delivered, the father in April, 1941, was advised that his instructions had been carried out (R. 420).

On December 3, 1943, the Alien Property Custodian made an administrative determination that petitioner was controlled by his alien father, declared him to be a national of Japan and accordingly vested the

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<sup>1</sup>The term "Alien Property Custodian" herein includes that officer (Executive Order No. 9095, 7 Fed. Reg. (1942) 971) or his successor, the Attorney General (Executive Order No. 9788, 11 Fed. Reg. (1946) 11981) as the context may require.

<sup>2</sup>40 Stat. 411, 50 U.S.C. App. 1, et seq.; hereafter referred to as the "Act".

property (R. 13-17). Petitioner filed suit to recover his property in the District Court pursuant to Section 9(a) of the Act. The Alien Property Custodian answered, interposing three defenses:

(1) That the power of attorney under which petitioner's father's deed was executed was void (R. 20).

(2) That petitioner and his father effected the transaction "in a conspiracy and with the purpose and intent \* \* \* to defraud the United States" (R. 30).

(3) That petitioner "acted directly and indirectly for the benefit or on behalf of Yotaro Fujino \* \* \* and plaintiff (petitioner) is therefore a national of a foreign country \* \* \* and as such has no standing to institute or maintain this action" (R. 31).

At the trial all of the evidence was produced by petitioner. There was no evidence of sham, or that the father had any legal or equitable interest in the property. The District Court made no finding that the transaction was a sham or a fraud.

The Court of Appeals in a short opinion rejected the erroneous ruling of the District Court that petitioner's deed "is a nullity" because of lack of authority of the attorneys in fact and held that petitioner had the record title (R. 538, 540).<sup>3</sup> It made no specific reference to any of the detailed findings

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<sup>3</sup>If the opinion of the Court of Appeals can be construed to mean that the power of attorney (R. 479) was insufficient to authorize the conveyance, nevertheless the attorneys in fact had full authority under unrecorded instructions to execute the deed (R. 265-268, 418-421), *Arnold v. Reed*, 162 Mass. 438, 440 (1894).

of the District Court, but dismissed the case in the following terse paragraph:

The District Court found that although the record title stood in appellant's name the beneficial ownership of the property was retained by Yotaro and that in holding the record title appellant acted for and on behalf of Yotaro and was controlled by him. Thus in effect the record title was found to be a sham. The findings are supported by substantial evidence, are not clearly erroneous and hence are accepted by us as correct. (R. 540.)

The words "thus in effect" in the paragraph just quoted disclose the vice in the decree below. The District Court, as we have said, made no finding of fraud, conspiracy or sham. The attempt by the Court of Appeals to construe other findings of the District Court (without specific reference to them) as a conclusion that the transaction was a sham or fraud, requires a review by this Court to correct the misinterpretation by the Court below of the findings of the District Court.

If the property of a citizen is to be appropriated under the Act upon the ground that he has attempted a fraud against his government, it is not too much to ask that the trier of the facts at least make an unequivocal determination of the existence of the fraud. It is not enough for an Appellate Court to say that the District Court "in effect" found the transaction to be a sham. The District Court made no such finding and



indeed if it had the finding would not be supported by evidence.

The District Court found that petitioner was "a national of a foreign country within the meaning of Section 5(b) of the Trading With The Enemy Act and Executive Orders 8389 and 9095". (R. 59.) In reaching this conclusion the District Court did so upon an erroneous construction of the statute which placed the burden of proof upon petitioner to prove that he was not a national of a foreign country.<sup>4</sup>

The finding of the District Court that petitioner in Honolulu was controlled by his alien father in Japan was based upon acts done by petitioner in Hawaii, assisting his sisters in Honolulu who were in need of funds (R. 182, 213), in making a wedding present of \$500 to an American citizen, a son of his father's friend (R. 226) and finally in paying his father's income tax to the Collector of Internal Revenue (R. 275-7).

The acts relied on by the District Court as the basis of its finding that petitioner was under the control of his nonresident father were simple acts of filial decency and were wholly insufficient to afford the basis of such a conclusion.

Even if the parent-child relationship be held to constitute "control" within the meaning of Section 5(b) and the regulations issued thereunder, it is immaterial to the question whether petitioner sustained the burden

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<sup>4</sup>Cf. *Oyama v. California*, 332 U.S. 633, 644 (1947).

of showing that he was not an "enemy or ally of an enemy" under Section 9(a) of the Act.

The District Court erred in ruling that petitioner, a loyal American citizen, had the burden of proof of showing that he was not a national of Japan as that term is used in Section 5(b) of the Act. Section 9(a) does not place such a burden on a citizen as a condition precedent to the recovery of his property. If this is the proper construction of the Act, it is unconstitutional as authorizing confiscation of private property and a denial of due process of law under the Fifth Amendment.

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#### **OPINIONS BELOW.**

The opinion of the District Court (R. 49-60) is reported in 71 F. Supp. 1. The opinion of the Court of Appeals is not yet reported, but appears in the record, (R. 537-541).

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#### **JURISDICTION.**

The decree of the Court of Appeals sought to be reviewed was entered January 31, 1949 (R. 542). The jurisdiction of this Court is invoked under Public Law 773, 80th Congress, 2d Session, c. 646, Sections 1254 and 2101; Title 28, United States Code, Sections 1254 and 2101.

**QUESTIONS PRESENTED.**

The questions here may be summarized as follows:

(1) Did the Court of Appeals misconstrue the findings of the District Court in reaching its conclusion that the transaction in question was "in effect" a sham?

(2) Can the property of a citizen of the United States which he received by deed of gift from his alien father on March 21, 1941, be appropriated by the Alien Property Custodian where there was no agreement, express or implied, between the donor and donee that the latter would hold the property for the former?

(3) Should Section 9(a) of the Trading With The Enemy Act be construed to require a citizen of the United States to prove anything more than his "interest, right or title" and the fact that he is not "an enemy or an ally of an enemy" in order to recover property seized by the Alien Property Custodian under Section 5(b)?

(4) Does the action of the Alien Property Custodian in this case appropriating petitioner's property under the Trading With The Enemy Act as construed by the District Court amount to a denial of due process of law under the Fifth Amendment?

**STATUTES INVOLVED.**

The pertinent portions of the statutes involved and the Executive Orders are set forth in the Appendix.

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**REASONS RELIED ON FOR ALLOWANCE  
OF THE WRIT.**

This case involves a fundamental question under the Trading With The Enemy Act, namely, whether the property of a loyal American citizen can be confiscated by administrative action designating him as a national of a foreign country and whether upon the bringing of suit which Congress has authorized, his claim will be dismissed as though he were an enemy or ally of an enemy.

Although this case was fully briefed and argued below, the Court of Appeals<sup>5</sup> in a short opinion neither discussed the findings of the District Court (fifteen in number) nor the questions of law presented, but disposed of the case in a single sentence: "Thus in effect the record title was found to be a sham" (R. 540), a finding not made by the District Court and having no basis in the record.

The Court of Appeals, like the District Court, drew no distinction between Section 7(c) and Section 5(b) of the Act and failed to give effect to the changes wrought by the amendment. It failed to recognize that the purpose of the amendment was to reach

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<sup>5</sup>The case was argued September 13, 1949, and decided January 31, 1949. Supplemental briefs were requested by the court and filed (R. 535).

transactions previously without the reach of the vesting power. The purpose of the amendment was to bring within the reach of the vesting power assets which were enemy controlled though ostensibly friendly or neutral. It was not the purpose of the amendment to appropriate assets belonging to an admittedly loyal American citizen or a friendly neutral. *Clark v. Uebersee Finanz-Korp.*"

While it is conceded that under Section 5(b) the Alien Property Custodian might peremptorily seize the property of an American citizen if he suspects the assets are beneficially owned or are controlled by an enemy, however, when the citizen brings suit and establishes his "interest, right or title" and the fact that he is "not an enemy or an ally of an enemy" then under the command of Section 9(a) the erroneous seizure must be corrected and the property returned. The statute does not permit the confiscation of a citizen's property as was done in this case with the sanction of the Court of Appeals.

When the District Court decided this case, it did not have the benefit of the opinion of this Court in *Clark v. Uebersee Finanz-Korp.*, (supra) and understandably failed to integrate Section 2, Section 5(b), Section 7(c) and Section 9(a).

Section 2(a) defines the word "enemy" as—

Such other individuals \* \* \* or subjects of any nation with which the United States is at war, other than citizens of the United States \* \* \*

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\*332 U.S. 480, 485 (1947).

Section 7(c) authorizes the seizure in time of war of property supposed to belong to the enemy.

Section 5(b) adds the element of "control" by a national of a designated enemy country.

Section 9(a) permits the owner of property seized under Section 7(c) or 5(b) to sue for return of the property erroneously seized.<sup>7</sup>

Since the petitioner had "an interest, right or title" to the property under the deed from his father and was "not an enemy or ally of an enemy" he can recover by suit under the express provisions of Section 9(a) of the Act.

Under the construction of the Act adopted by the District Court the petitioner in this case was not only obliged to prove his American citizenship and to prove his title but to go beyond this and establish proof to the satisfaction of the court that he was not controlled by his father.

To sustain the decree below it is necessary to construe "enemy" to include a citizen of the United States in face of an express declaration by Congress to the contrary in Section 2 of the Act defining the term "enemy". We contend that if this is the proper construction of the Act it is unconstitutional as a denial of due process of law.

Assuming that an American citizen must not only prove his citizenship and his title, but also must estab-

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<sup>7</sup>*Central Trust Co. v. Garvan*, 245 U.S. 554, 556 (1921).

lish by a preponderance of the evidence that he was not controlled by an enemy, we contend that under the uncontradicted evidence that burden has been surmounted and that there is no substantial evidence to support a finding that petitioner was controlled by his father.

This case is important for it is the first (to our knowledge) that has come here involving the question whether a native born, loyal American citizen can be administratively found to be a national of an enemy country and his right to recover his property proscribed as though he were an enemy or an ally of an enemy. If this is the proper construction of the Act in face of the plain language of Section 2, defining "enemy or ally of an enemy" as certain persons "other than citizens" and of Section 9(a) allowing suit and recovery it should be so declared by this Court.

Wherefore, petitioner prays:

That a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify to and send to this Court for its review and determination a full and complete transcript of the record and proceedings of said court had in the case numbered and entitled in its docket as "No. 11786, Kaname Fujino, Appellant, v. Tom C. Clark, Attorney General of the United

States, Appellee" and that the decree of said court be reversed by this Court.

Dated, Honolulu, Hawaii,  
March 11, 1949.

KANAME FUJINO, *Petitioner.*

By J. GARNER ANTHONY,  
*Counsel for Petitioner.*

ROBERTSON, CASTLE & ANTHONY,  
*Of Counsel.*

(Appendix Follows.)



## Appendix

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### *Statutory Provisions*

Trading With The Enemy Act. c. 106, 40 Stat. 411,  
as amended (50 U.S.C. App. 1-31):

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

\* \* \* \* \*

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy".

The words, "ally of enemy", as used herein, shall be deemed to mean—

\* \* \* \* \*

(c) Such other individuals, or body, or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy".

Sec. 5 (as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U.S.C. App., Supp. V, 5(b)):

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or ear-marking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the

President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; \* \* \* and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

\* \* \* \* \*

Sec. 7 (as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020):

\* \* \* \* \*

(c) If the President shall so require any money or other property \* \* \* owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy \* \* \* which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

\* \* \* \* \*

Sec. 9 (as amended):

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the

Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled:

*Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its prin-

cipal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Executive Order No. 9095 (as amended):

\* \* \* \* \*

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

\* \* \* \* \*

(c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof:

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines:

- (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or
- (ii) that such person is a citizen or subject of a des-

ignated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading With The Enemy Act, as amended.

Executive Order No. 8389 (as amended) :

\* \* \* \* \*

#### Section 5.

\* \* \* \* \*

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly,



such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a



national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

# INDEX

|                          |           |
|--------------------------|-----------|
| Opinions below .....     | Page<br>1 |
| Jurisdiction .....       | 1         |
| Question presented ..... | 2         |
| Statement .....          | 2         |
| Argument .....           | 9         |
| Conclusion .....         | 11        |

## CITATIONS

### Cases:

|  |    |
|--|----|
| <i>Clark v. Uebersee-Finanz Korporation, A. G.</i> , 332 U. S. 480 .....                 | 3  |
| <i>Comstock v. Group of Institutional Investors</i> , 335 U. S. 211 .....                | 10 |
| <i>General Talking Pictures Corp. v. Western Electric Co.</i> , 304 U. S. 175 .....      | 10 |
| <i>Oyama v. California</i> , 332 U. S. 633 .....   | 9  |
| <i>Standard Oil Co. v. Clark</i> , 163 F. 2d 917, certiorari denied, 333 U. S. 873 ..... | 9  |
| <i>Stoeck v. Wallace</i> , 255 U. S. 239 .....   | 9  |
| <i>Sturchler v. Hicks</i> , 17 F. 2d 321 .....   | 9  |
| <i>Thorsch v. Miller</i> , 5 F. 2d 118 .....   | 9  |
| <i>United States v. Chemical Foundation</i> , 272 U. S. 1 .....                          | 10 |
| <i>United States v. Johnston</i> , 268 U. S. 220 .....                                   | 10 |
| <i>Von Zedtwitz v. Sutherland</i> , 26 F. 2d 525 .....                                   | 9  |

### Statutes:

Trading With the Enemy Act, 40 Stat. 411, as amended (50 U.S.C. App. § 1 et seq.):

|                 |      |
|-----------------|------|
| Sec. 5(b) ..... | 7    |
| Sec. 7(c) ..... | 3    |
| Sec. 9(a) ..... | 2, 9 |

### Miscellaneous:

|  |   |
|--|---|
| Hawaii Revised Laws (1945), Section 12757 .....              | 3 |
| Executive Order No. 9788, Oct. 15, 1946, 11 F.R. 11981 ..... | 2 |
| Executive Order No. 8389, April 10, 1940, 5 F.R. 1400 .....  | 7 |
| Federal Rule of Civil Procedure No. 52(a) .....              | 9 |
| Vesting Order No. 1756, 8 F.R. 10834 .....                   | 5 |
| Vesting Order No. 7939, 12 F.R. 153 .....                    | 5 |



# ***In the Supreme Court of the United States***

OCTOBER TERM, 1948

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No. 659

KANAME FUJINO, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED  
STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH  
CIRCUIT*

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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## **OPINIONS BELOW**

The opinion of the Court of Appeals for the Ninth Circuit (R. 537-541) is reported at 172 F. 2d 384. The opinion of the District Court (R. 49-60) is reported at 71 F. Supp. 1.

## **JURISDICTION**

The judgment of the Court of Appeals was entered January 31, 1949 (R. 542). The petition for writ of certiorari was filed March 21,

1949. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

#### QUESTION PRESENTED

Whether there is substantial evidence to support the findings of both courts below that the purported gift of real property to petitioner, an American citizen, by his Japanese father did not transfer beneficial ownership.

#### STATEMENT

This is a suit brought by petitioner, an American citizen, under Section 9(a) of the Trading With the Enemy Act, 40 Stat. 419, as amended (50 U.S.C. App. § 9(a)), to recover six parcels of land in Hawaii which were vested by the Alien Property Custodian<sup>1</sup> pursuant to the Trading With the Enemy Act.

The District Court, after trial, entered judgment dismissing the complaint (R. 60-62). It found (R. 54-55):

Although record title to the six parcels of land stood in plaintiff's name, he did not have or purport to exercise complete and absolute ownership of the property. Notwithstanding the deed, plaintiff's father, the grantor, has, through his attorneys in fact and personally, retained control and the beneficial ownership

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<sup>1</sup> By Executive Order No. 9788, October 15, 1946, 11 F.R. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the term "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

of the land. In holding the record title to the land, plaintiff has acted for and in behalf of his father and has been controlled by him.

And it concluded that the property in suit was "property 'owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of, an enemy' (Yotaro Fujino)" within the meaning of Section 7(c) of the Trading With the Enemy Act (R. 59) and that "plaintiff has no 'interest, right or title' in the real property within the meaning of Section 9(a) of the Act" (R. 60).

The Court of Appeals affirmed. It said (R. 540):

The District Court found that, although the record title stood in appellant's name, the beneficial ownership of the property was retained by Yotaro, and that, in holding the record title, appellant acted for and on behalf of Yotaro and was controlled by him. Thus, in effect, the record title was found to be a sham. The findings are supported by substantial evidence, are not clearly erroneous and hence are accepted by us as correct.<sup>2</sup>

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<sup>2</sup> The Court of Appeals accordingly found it unnecessary to pass on two other grounds of decision relied upon by the District Court: (a) that the deed of gift of the land was formally defective because the asserted authority of the persons executing it was evidenced by a recorded power of attorney, and the deed was therefore not binding on third parties under the laws of Hawaii (Rev. Laws, 1945 § 12757) (R. 55-57); and (b) that the plaintiff was a "national" of Japan because controlled by and acting for and on behalf of his father and hence not entitled to recover in a suit under Section 9 (a) (R. 59). Cf. *Clark v. Uebersee-Finanz Korporation, A. G.*, 332 U.S. 480.

The evidence relating to this finding of continuing beneficial ownership in the enemy father may be thus summarized:

Petitioner's father, Yotaro Fujino (hereinafter referred to as Yotaro), was a citizen of Japan and resided in Japan continuously since 1935 (Fdg. 6, R. 50; R. 73, 258). Prior to 1935, while living in the Territory of Hawaii, he was the owner and sole proprietor of a Hawaiian business, the Oahu Junk Company (Fdg. 10, R. 52; R. 71). The facilities of the business were located on at least four and possibly five of the six parcels of land here involved (Fdg. 11, R. 53; R. 72, 122-123, 157). The land and structures thereon were regarded as property of the business (R. 391) and were necessary and indispensable to its conduct and operation (Fdg. 11, R. 53; R. 309).

Between April and July 1940, Mr. Robert Murakami, Yotaro's attorney in Hawaii (R. 71, 102), was in Japan (R. 82). He and Yotaro then formulated plans for the disposition of Yotaro's Hawaiian property, including his business and the real property here in suit (R. 83). Among the factors which motivated these discussions were "the strained relationship between the United States and Japan" (Fdg. 7, R. 51; R. 117-118) and the fact that if Yotaro should die intestate, his personal property would probably

go under Japanese law to collateral heirs rather than to his children (R. 84-87).<sup>3</sup>

It was decided that the business, exclusive of the real property on which it was located, should be incorporated, that substantial stock holdings should be placed in the names of Yotaro's wife and three children, and that a deed of gift of the land to the petitioner should be executed (R. 87-89).

These plans were subsequently carried out by Murakami and by Yotaro's trusted business agents, Tsuda and Tsutsumi, pursuant to instructions from Yotaro (R. 120, 270-271, 294-295). The business was incorporated in November 1940 (D. Ex. 4, R. 449-454; Pl. Ex. D, R. 468-478). Upon the issuance of shares to petitioner and his sisters, they gave Yotaro notes representing the par value of the shares and pledged the shares as security (R. 87-88, 118-120, 178-179, 270-271). This was done in order to carry out Yotaro's repeatedly expressed desire to retain "parental control" over the business (R. 271, 295, 383).<sup>4</sup> In March 1941 the agents, purporting to act under powers of attorney from Yotaro and his wife, executed a deed of gift of the land to the petitioner (Pl. Ex. H, R. 501-509). Shortly

<sup>3</sup> It was believed that the real property in Hawaii would go under Hawaiian law to his children equally (R. 84), and Yotaro expressed the desire that his son should inherit it under the Japanese principle of primogeniture (R. 88).

<sup>4</sup> The Custodian has vested the entire capital stock of the Oahu Junk Company as the property of nationals of a designated enemy country. Vesting Order No. 1756, 8 F.R. 10834; Vesting Order No. 7939, 12 F. R. 153. No claims for the return of this stock have yet been filed with the Custodian.



prior to its execution, however, the agents had mortgaged the land as security for an indebtedness of the corporation (Pl. Ex. G, R. 488-500; R. 97-99; 125-128).

At the time of the formulation and execution of these plans, petitioner was twenty-one years old and had been living for several years with his father in Japan (R. 174). Nevertheless, he did not participate in any of the discussions concerning them, and his approval of the various acts done was apparently never deemed necessary (R. 114-115). His father instructed him to execute a power of attorney in favor of the agents so that they could effectuate the pledge of the shares issued him, and on his return to Hawaii in May 1941 the agents instructed him to endorse the mortgage note encumbering the land; in each case he complied without question (R. 178-179, 211).

After the incorporation, as before, the business continued to be managed by Yotaro's agents acting pursuant to instructions received by letter and cable from Yotaro (R. 316-317, 320-1; D. Ex. 5-A, 7-A, 8-A, 9, R. 455-458; Pl. Ex. L-1, M-1, O, Q, R, R. 515-18, 525, 527, 528). Petitioner testified that upon his return to Hawaii, although he was elected president of the corporation at his father's instructions (R. 316-317), he "had nothing to do with the management of the business at all." (R. 185). His intention upon returning to Hawaii was to enter into a four year course of study at the Uni-

versity of Hawaii (R. 183). At least until the spring of 1943 he studied at the University and in his spare time would "help out" at the store by serving as clerk or bookkeeper (R. 212). Petitioner further testified that before he left Japan his father had said, referring to his Hawaiian interests generally, that "eventually he will \* \* \* give it all to me," but that for the present "since I was going to school, and I did not show my merits yet, so he told me to study hard and when I come back, after I go to school, help in that store." (R. 180; see also 151, 229).

Despite the fact that the land on which the corporation's facilities were located was not conveyed to the corporation, but was purportedly given to petitioner, no one doubted that the corporation would be able to continue using it (R. 309-310, 344-346). No written lease was thought necessary (R. 188-189). Not only did petitioner not ask any rental, but he testified that he had had no intention of demanding a rental during the four years that he planned to attend the University of Hawaii (R. 241-242; see also 278, 302). Nevertheless, within a month after the "freezing," on July 26, 1941, of the accounts of Yofaro and of the Oahu Junk Company, Ltd., pursuant to Section 5(b) of the Trading With the Enemy Act and Executive Order 8389, as amended, the business agents suggested to petitioner that the corporation pay rental for the land, beginning retroactively with the month of March

1941, and at the rate of \$300 a month (R. 185-186, 204-205, 298-302).<sup>5</sup>

The agents further instructed him to start a checking account with the rental payments received (R. 237, 240), which he did (R. 239). Petitioner testified that he and his father's agents discussed the effect of the freezing at the same time (R. 240, 300-301) and said that "it could be" that the freezing order affected the decision that he should open a checking account (R. 241). The funds in this newly established account were used for such family purposes as payment for petitioner's schooling (R. 186), provision for the needs of his sisters (R. 189, 213), the giving of a \$500 wedding present to an employee of the corporation (R. 190-191, 226-227) and the payment of his father's tax obligations (R. 244-246, 327-328). The wedding present and the tax payment would have been made by the corporation had its funds not been frozen (R. 327-329). In several cases petitioner received express instructions from his father or his father's agents as to the use to be made of the funds (R. 192-195). He testified further that in general he felt obligated to use any funds received from the land to satisfy any obligations which his father would have met had he been present (R. 190).

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<sup>5</sup> Although Tsuda testified that the rental was "somewhat cheap" (R. 278), petitioner accepted the suggested figure without question (R. 185, 189, 204).

## ARGUMENT

To recover under Section 9(a) of the Trading With the Enemy Act, the plaintiff must establish that he was the owner of the property prior to vesting.<sup>6</sup> It is well settled that possession of record title is not enough; the Trading With the Enemy Act is concerned not with formalities of record but with "beneficial ownership." *Stoehr v. Wallace*, 255 U.S. 239, 251.<sup>7</sup> Under the Act formal transfers which "made no substantial change in the relevant property interests of the parties" will be disregarded. *Standard Oil Co. v. Clark*, 163 F. 2d 917, 923 (C.A. 2), certiorari denied, 333 U.S. 873. Both courts below have found that, despite the transfer of record title, the enemy father continued to control the use and to retain the beneficial enjoyment of the land in suit. This finding, far from being "clearly erroneous" (Federal Rules of Civil Procedure, Rule 52(a)), is abundantly supported by the record. In any event, no issue of general im-

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<sup>6</sup> It is settled that the burden of proof is on the plaintiff. *Von Zedtwitz v. Sutherland*, 26 F. 2d 525, 526 (C.A. D.C.); *Thorsch v. Miller*, 5 F. 2d 118, 122-3 (C.A. D.C.); *Sturchler v. Hicks*, 17 F. 2d 321, 322 (E.D. N.Y.). Petitioner relies on *Oyama v. California*, 332 U.S. 633, 644, in this regard. That case is clearly irrelevant; it held only that a heavier burden of proof could not be placed upon American citizens of Japanese ancestry than upon those of American ancestry. Here no heavier burden has been placed on petitioner than on any other plaintiff under Section 9(a).

<sup>7</sup> It is not necessary that the record disclose a purpose to "cloak" the continuing enemy ownership; the test is the continued existence of beneficial ownership in an enemy. *Stoehr v. Wallace*, *supra*.

portance is presented. It is settled that the Court will regard "concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178; *United States v. Chemical Foundation*, 272 U.S. 1, 14; *United States v. Johnston*, 268 U.S. 220, 227.<sup>8</sup>

Petitioner's remaining contentions are based on the erroneous premise that he was the owner of the land at the time of vesting. Thus, he seeks (Pet. 7) to present the questions whether "the property of a citizen of the United States" can be "appropriated" by the Custodian under certain circumstances; whether in a suit under Section 9(a) the plaintiff should be required to prove anything more than his interest, right or title,

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<sup>8</sup> Plaintiff seeks to escape the force of the "two-court rule" by asserting that the Court of Appeals misconstrued the District Court's findings. But the District Court expressly found that the enemy father retained control and the beneficial ownership of the land. (Fdg. 15, R. 55).

It is true that the District Court, in its informal "comment" on the findings, appeared to emphasize its conclusion of law that the deed of gift was not effective against the Custodian because executed by attorneys in fact whose power to execute it was not recorded in conformity with Hawaiian law (R. 55-57). But the text of Finding 15, quoted in part above, shows that this formal defect was only an alternative ground for the conclusion that the father retained the beneficial ownership. Moreover, this ground of local law was not rejected by the Court of Appeals and the petition raises no contention that the District Court's decision in this respect is in conflict with Hawaiian law. Accordingly, this holding affords an independent ground in support of the decision below.

and his non-enemy status; and whether the action of the Custodian "appropriating petitioner's property" amounts to a denial of due process of law under the Fifth Amendment. The courts below rejected the premise on which each of these questions is based by holding that the petitioner was not the owner of the land prior to vesting; accordingly, none of these questions is presented here.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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